Supreme Court, U.S.
FILED

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In the

Supreme Court of the United States

October Term, 1998

LEOTA DIXON,
as Personal Representative
for Joseph Pete Dixon, deceased,

Petitioner,

v

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a civil litigant entitled to relief from a district court dismissal when there is no federal statute controlling the time in which a case must be re-filed after a dismissal without prejudice and the trial judge fails to state in its order of dismissal a time frame for re-filing?

Petitioner, Leota Dixon, ("Dixon") respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

Table Of Contents

Page

Question Presented For Review i

Table Of Contents ii

Table Of Authorities iii

Opinions Below 1

Statement Of The Basis Of Jurisdiction 1

Constitutional, Statutory And Ordinance Provisions Involved In This Case 1

Statement Of The Case 1

Argument 4

I. REASONS FOR GRANTING THE WRIT THE PETITION SHOULD BE GRANTED BECAUSE THE LOWER COURTS MUST BE INSTRUCTED TO ANNOUNCE DEADLINES CONCERNING RE-FILING UPON A DISMISSAL WITHOUT PREJUDICE 4

Conclusion 8

Appendix

Opinion Of The United States Court Of Appeals For The Eighth Circuit 1a

Memorandum And Order Of The United States District Court, Western District Of Oklahoma 4a

Order Of The United States District Court, Western District Of Oklahoma 6a

TABLE OF AUTHORITIES

Page

Cases

Datskow v. Teledyne, Inc. Continental Prods. Div., 899 F. 2d 1298, 1302-1303 (2nd Cir.) *cert denied* 111 S.Ct. 149, 112 L.Ed. 16 (1990) 5

Irwin v. Veterans Admin., 498 U.S. 89, 111 S.Ct. 453, 458, 112 L.Ed.2d 435 (1990) 6

Pipkin v. United States Postal Service, 951 F.2d 272 (10th Cir. 1991) 6

Sanderford v. Prudential Ins.Co., 902 F.2d 897, 900-901 (11th Cir. 1990) 5

Statutes

28 U.S.C. Section 1254(l) 1

Opinions Below

The opinion of the United States Court of Appeals for the Tenth Circuit is unreported but is found in the appendix at 1a. The opinion of the district court in *Dixon v. United States*, 98-CV-926 is not published but can be found at Appendix 4a, herein.

Statement Of Jurisdiction

The judgment of the United States Court of Appeals for the Tenth Circuit ("Court of Appeals") was entered on June 14, 1999. No petition for rehearing was sought.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Constitutional And Statutory Provisions Involved

There are no statutory or constitutional provision involved in this case.

Statement Of The Case

The fundamental question in this case is whether a litigant is entitled to relief from an order dismissing a case without prejudice when there is no federal statute controlling the time for re-filing after an order of dismissal without prejudice and the the order fails to inform the litigant of the

deadline for re-filing the case? The following brief statement of facts are necessary to determine the issue.

A. Background of the Case

On March 7, 1997, Dixon filed a case entitled *Leota Dixon, as Personal Representative for Joseph Pete Dixon, deceased, Plaintiff v. United States of America, Defendant,* Case No. CIV-97-344-T.

On June 16, 1997, Dixon caused summons to be issued and Dixon served the parties to the case, but failed to properly file the return of service with the clerk of the court.

On July 29, 1997, Judge Thompson dismissed, without prejudice, the case for want of prosecution.

On August 28, 1997, the United States of America filed a motion to stay.

Thereafter, Dixon filed a motion for extension of time in which to respond to Defendant's Motion to Stay.

On September 17, 1997, Judge Thompson entered an order striking both Defendant's Motion to Stay and Plaintiff's Motion for Extension of Time as moot.

Pursuant to the dismissal without prejudice, Dixon again filed her complaint under the Tort Claims Act.

On September 1, 1998, the United States Moved to Dismiss and requested the cause be transferred to Judge Thompson in accordance with G.O. 96.1.

In the motion to dismiss, the United States asserted that Dixon's tort claim was denied on either October 8, 1996 or May 1, 1997. The United States asserted that since the claim was brought beyond the six month period it was untimely. The United States failed to assert that the claim was barred because it was not brought within six months of the dismissal without prejudice by Judge Thompson.

On October 5, 1998, Dixon submitted her response stating that the case was timely filed because it was filed within one year of the dismissal without prejudice.

On October 14, 1998, the district court granted the United States' motion to dismiss. Each of the facts recited are contained in the record below. Indeed, there is no dispute regarding the facts as recited or the order of proceedings.

B. The Proceedings Below

On November 13, 1998, Dixon appealed the decision of the district court. On June 14, 1999, the Court of Appeals for the Tenth Circuit affirmed the decision of the district court. Both the district court and the Court of Appeals held that the second complaint was untimely. Neither addressed the failure of the district court to set deadlines for re-filing.

ARGUMENT

I. REASONS FOR GRANTING THE WRIT THE PETITION SHOULD BE GRANTED BECAUSE THE LOWER COURTS MUST BE INSTRUCTED TO ANNOUNCE DEADLINES CONCERNING RE-FILING UPON A DISMISSAL WITHOUT PREJUDICE

There is no federal savings statute which controls the time frame in which a case must be re-filed after it is dismissed by the district court without prejudice. Thus, it must be the responsibility of the district court to inform the litigant of the filing deadline. The district court wholly failed in this regard and the Court of Appeals affirmed this error.

In advancing the appeal below, Dixon first contended that the district court decided to dismiss the case on the basis of an argument that the United States failed to raise. In support of its motion to dismiss, the United States asserted that Dixon failed to file an action within six months of its denial of Dixon's tort claim. However, the United States failed to inform the district court that Dixon did indeed file a complaint within the six month period and moved the court to stay the proceedings. The action was dismissed without prejudice with no instruction from the district court concerning a deadline for re-filing. Accordingly, any delay in filing the second complaint did not offend the limitation considerations set forth in *Pipkin* Dixon next contended that there were ample facts before the court to equitably toll the limitations period; thus, it was an abuse of discretion to grant the United States' motion to dismiss.

The first error is that the district court decided an issue that the United States did not assert. Indeed, the United States contended only that the action was untimely because Dixon had failed to file a complaint prior to the expiration of six months from October 8, 1996 or May 1, 1997. This assertion was error. Under *Sanderford v. Prudential Ins.Co.*, 902 F.2d 897, 900-901 (11th Cir. 1990)(minor technical flaw in summons did not prejudice recipient and will not deprive court of personal jurisdiction); *Datskow v. Teledyne, Inc. Continental Prods. Div*, 899 F. 2d 1298, 1302-1303 (2nd Cir.)(participation in litigation without challenging service of process waivers defense of lack of personal jurisdiction), *cert denied* 111 S.Ct. 149, 112 L.Ed. 16 (1990).

In this case, Dixon filed her first complaint on March 7, 1997, well within the six months expiration period. Moreover, on August 28, 1997, the United States filed a Motion to Stay the Proceedings. What added further confusion to the matter is that in the intervening period between the filing of the first complaint and the United States motion to stay, Judge Thompson entered an order of dismissal without prejudice for failure to prosecute. The order was entered on July 29, 1997. In its motion to stay, the United States did not raise any objection to the service. Further, after receipt of the United States' motion to stay, Dixon moved the court to respond to the motion to stay. The court however was intransigent in its position and simply responded to the motion as moot. Finally, the Thompson court failed to give any guidance concerning the time period for re-filing the action. This was especially needful in light of fact that the United States by filing a responsive pleading did indeed acknowledge service.

In deciding that Dixon's second complaint was untimely, the district court relied upon *Pipkin v. United States Postal Service*, 951 F.2d 272 (10th Cir. 1991). The Court of Appeals affirmed that reliance. Now, bear in mind that the court decided a matter which had not been raised by the United States; however, the court failed to give any attention to the language in *Pipkin* which speaks to equitable tolling.

In *Pipkin*, this circuit recognized "that equitable considerations may permit the extension of time limits on federal claims." The *Pipkin* court looked to *Irwin v. Veterans Admin.*, 498 U.S. 89, 111 S.Ct. 453, 458, 112 L.Ed.2d 435 (1990) to conclude that equitable tolling may be applied to federal claims, but doctrine does not extend to a "garden variety claim of excusable neglect").

The facts of the case which were before the court clearly supported equitable tolling. First, there is sufficient uncertainty concerning the proceedings in the first complaint. There is no question that there was confusion created by Judge Thompson's dismissal of the first complaint on July 29, 1997; the subsequent motion to stay proceedings filed by the United States on August 28, 1997, which evidenced service; and the court's failure to correct its own error. This set of circumstances was before the court in the second complaint as there were plainly set forth in Dixon's response.

Second, there is no question that the United States did not raise the issue which was the bases of the dismissal order by Judge Alley in the second complaint. The United States contended only that it had denied Dixon's claim on two occasions--October 8, 1996 and May 1, 1997 and that Dixon did not file a complaint within the six month period following the denial. The United States advised Judge Alley that Dixon

filed her first complaint on March 7, 1997; however it wholly failed to advise the court that it did file a responsive pleading on August 28, 1997 wherein it moved the court to stay the proceedings. This failure is key to the analysis.

In deciding *Pipkin* the Tenth Circuit held: "In enacting the FTCA limitations period, 28 U.S.C. Sec 2401(b), as a condition of that waiver, Congress struck a balance between providing a reasonable time limit for plaintiffs to present tort claims against the United States and preventing assertion of stale claims." *Pipkin at 275.* The facts of this case do no violence to *Pipkin* for this reason, the United States sought to stay the proceedings for an indefinite period. Thereafter, the United States failed to move the court to strike its response. In this light the United States can assert no good faith argument that it was somehow prejudiced by the filing of the second complaint on July 2, 1998. To be sure, the United States contemplated a delay as evidenced by its motion to stay. *Pipkin* is further distinguishable in that the defendant in that case never filed a responsive pleading which was not stricken. Considering the cloud surrounding the court's action in the original matter and Judge Thompson's intransigence to correct its action *sua sponte*, there is overwhelming support for equitable tolling.

CONCLUSION

This case presents a question of exceptional importance whether a litigant is entitled to relief from a judgment if the district court failed to provide a time for re-filing after a dismissal without prejudice and there is no federal statute providing for the time for re-filing. Time and time again litigants are faced with the task of guessing the proper deadline for re-filing after a district court has dismissed the matter without prejudice and without announcing deadlines for re-filing. Accordingly, Dixon respectfully requests that their petition for writ of certiorari be granted.

Respectfully submitted,

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No. 98-6455

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

LEOTA DIXON, as Personal Representative for Joseph Pete Dixon, deceased,
Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA,
Defendant - Appellee.

June 14, 1999, Filed

NOTICE: RULES OF THE TENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

COUNSEL: For LEOTA DIXON, Plaintiff - Appellant: Guinise M. Marshall, Oklahoma City, OK.

For UNITED STATES OF AMERICA, Defendant - Appellee: Kay Sewell, Asst. U.S. Attorney, Office of the United States Attorney, Oklahoma City, OK.

JUDGES: Before TACHA, McKAY, and MURPHY, Circuit Judges.

OPINION BY: DEANELL REECE TACHA

OPINION:

ORDER AND JUDGMENT *

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

This appeal is from an order of the district court dismissing plaintiff's complaint for lack of subject matter jurisdiction on the ground that the statute of limitations had run for her claim under the Federal Tort Claims Act ("FTCA"), *28 U.S.C. § 1346*(b). We affirm.

The facts of this case are not in dispute. On March 26, 1996, plaintiff filed an administrative claim with the Department of Veterans Affairs seeking $ 300,000 in compensatory damages for the death of her husband. The agency denied plaintiff's claim on October 8, 1996. Plaintiff received notice of the denial on May 2, 1997. Plaintiff brought this action on July 2, 1998. The FTCA requires that claimants file suit within six months "after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." *28 U.S.C. § 2401*(b). If this statute of limitations is not met, a tort claim against the United States is barred.

Plaintiff argues on appeal that the filing of this suit should relate back to the filing of a previous suit in the United States

District Court. Although that initial suit was commenced within the appropriate limitations period, it was dismissed without prejudice for want of prosecution on July 29, 1997. We find no basis for plaintiff's argument that the filing of the first suit should excuse the running of the statute of limitations for the purposes of this action. Because this suit was filed as a separate claim and not as an amendment or any kind of supplementary pleading, it cannot relate back to the previously filed claim. See *Benge v. United States, 17 F.3d 1286, 1288 (10th Cir. 1994).* Additionally, plaintiff asserts that the Oklahoma statute of limitations savings statute, Okla. Stat. Ann. tit. 12, § 100, applies to this case. The district court correctly determined that the statute does not apply to this federal tort claim action. See *Benge, 17 F.3d at 1288.*

Plaintiff further argues that the doctrine of equitable tolling should be applied to remove her claim from the operation of the six-month statute of limitations. We disagree. Assuming arguendo that the doctrine of equitable tolling should be applied to plaintiff's situation, it would not save her claim. The doctrine of equitable tolling "means only that the running of the statute is suspended, not that the limitations period begins over again." Id. Thus, even if the limitations period was suspended during the pendency of the initial suit, it would have resumed after the first suit was dismissed on July 29, 1997. Plaintiff did not commence this action until almost a year after the initial suit was dismissed, well after the expiration of any additional period to which plaintiff would have been entitled. We therefore agree with the district court that it was without subject matter jurisdiction.

AFFIRMED.
ENTERED FOR THE COURT,Deanell Reece Tacha
Circuit Judge

No. 98-6455

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

LEOTA DIXON, as Personal Representative for Joseph Pete Dixon, deceased,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

October 14, 1998

ORDER OF DISMISSAL

Before the Court is defendant's Motion to Dismiss, filed September 1, 1998 pursuant to Fed. R. Civ. P. 12(b)(1). Defendant seeks dismissal of claims brought under the Federal Tort Claims Act (FTCA), 28 U.S.C. Secs. 1346(b), 2671-80, because this action was not filed within six months after plaintiff's receipt of a denial of her administrative claim. Defendant contends that under 28 U.S.C. Sec 2401 (b), the Coiurt lacks jurisdiction due to plaintiff's untimely filing of suit. In support of this, defendant demonstrates that plaintiff filed an administrative claim April 8, 1996, that the claim was denied October 6, 1996, and that plaintiff received notice of the denial on May 2, 1997.

Plaintiff opposes the motion but does not dispute these facts. Instead, she points out that she first filed her

judicial complaint in March 1997, Case No. CIV-97-344-T, and that the case was dismissed without prejudice on July 29, 1997. Plaintiff asserts the state law "saving" provision of Okla. Stat. tit. 12, Sec 100, renders this suit timely filed within one year after the prior dismissal.

Plaintiff's arguments is frvolous. The court of appeals held in Pipkin v. United States Postal Serv., 951 F. 2d 272, 275 (10th Cir. 1991), that "the Oklahoma savings provisions is not applicable to the FTCA limitations period." See also Benge v United States, 17 F.3d 1286, 1288 (10th Cir. 1994). Plaintiff presents no other basis for avoiding the time bar of Sec 2401(b). Under the undisputed facts, this suit filed July 2, 1998, clearly is untimely. Plaintiff's noncompliance with FTCA's prerequisites to suite against the United States deprives this Court of jurisdiction. See Lee v. United States, 980 F. 2d 1227 (10th Cir. 1992) (affirming dismissal of time-barred FTCA suit for lack of subject matter jurisdiction).

Therefore, defendant's motion to dismiss is GRANTED. The case is DISMISSED.

No. 98-6455

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

LEOTA DIXON, as Personal Representative for Joseph Pete Dixon, deceased,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

September 17, 1997

ENTER ORDER:

Defendant's motion to stay and plaintiff's motion for extension of time (which fails to comply with LR7.1(f)) are stricken as moot, as this case was dismissed on July 29, 1997.

THE ABOVE ORDER ENTERED AT THE DIRECTION OF JUDGE RALPH G. THOMPSON

Deputy Clerk